

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1268 OF 2004

M/s. Raj Publicity .. Appellants

Versus

The Juhu Gulmohar Co-operative
Housing Society Ltd. .. Respondents

Mr.Navin Parekh with i/b Hetal Patel for appellants

Mr.Vinay J. Hegde for respondentns

CORAM : P.V.KAKADE, J.

DATE : 22ND DECEMBER, 2004

P.C.:

1. This is an appeal preferred against the Judgment and Order passed by City Civil Court Judge, Bombay dated 23rd September, 2004 dismissing the plaintiffs suit with costs.

2. Heard the learned counsel for both the parties.
Perused the record.

3. The plaintiff company carries on business of display of advertisement on the hoardings. The plaintiffs claimed that pursuant to the agreement dated 3.8.1986, the defendants society agreed to allow the plaintiffs to display the hoarding and to construct the scaffolding in the society compound on payment of certain remuneration to the society. The agreement was duly executed and signed by the parties on 3.8.1986. As per the said contract the period of commencement of displaying the advertisement over the hoarding was to start from the date of which corporation would grant permission. According to the plaintiff, the corporation granted permission for user of the hoarding in the year 1989. The period of contract as mentioned in Exh.7 is for one year, with further option to the plaintiff to renew the same for further period of four years. It was also plaintiffs' case that vide letters dated 8.3.1994 and 18.3.1994, the society directed the plaintiffs to remove himself from the suit premises and not to use the hoarding thenceforth. This was said to be the cause of action to file the suit.

. The defendant appeared and challenged the suit on various grounds. The issues were settled and parties

went to trial. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs failed to prove that they had acquired irrevocable right in respect of the suit hoardings and that the same was not liable to be removed or dismantled or damaged by the defendants. Hence the present appeal.

4. While hearing the matter it was pointed out that apart from the merits of the case the learned Judge did not adhere to the mandatory procedure of the trial which had prejudiced the plaintiffs cause. In support of this version my attention is invited to Roznama dated 23.9.2004 which read thus -

"The plaintiff filed affidavit at Exh.4. I perused it. From the affidavit I hold that none of the documents are proved and hence they are not marked. Mr. Hegde at this stage admitted certain documents by making endorsement on Exh.5. Those documents are marked at Ex.6 to Ex.23. The cross of PW1 is over. the plaintiff filed a pursis at Ex.24 and closed case. The defendant filed a pursis at Ex.25 and closed his case. Arguments heard. Judgement dictated.

for the reasons separately recorded following order is passed :

. ORDER

The suit of the plaintiff is dismissed with cost."

On the basis of this Roznama it was submitted on behalf of the appellant that the learned trial judge did not rightly consider the documents produced on record and discarded those from consideration, which were admissible as well as relevant. The list of the documents is brought to my notice which shows that in all 26 documents were sought to be produced on record by the plaintiffs out of which vide Sr.Nos.2, 4, 5, 14, 19, 24, 25 and 26 came to be discarded from consideration on the ground that on perusal of affidavit the documents were not proved and therefore not marked. In other words those were rejected from consideration.

. In my considered view, this approach of the learned trial judge is totally wrong and did cause prejudice to the cause of the plaintiff. The provision

of Order 18 Rule 4 of C.P.C. is very much clear. The proviso to Rule 4 states that -

"Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the court."

Therefore it is needless to mention that the documents which are sought to be produced on record are required to be subjected to scrutiny of the learned trial judge. However, in doing so the procedure also demands that the parties must be given opportunity either to admit or to deny the documents as per their instructions and pleadings, which has not been done in this case. Moreover, the perusal of the affidavit of the plaintiff shows that these impugned documents noted earlier are in fact mentioned in the affidavit and therefore, it was not correct on the part of the learned judge to hold that those were not proved and therefore, discarded from consideration. It must be noted that time and again this court has held that the mention of documents shall be by way of affidavit and if it is mentioned in the

affidavit then it would be a prima facie proof of relevancy or admissibility of the documents subject to judicial scrutiny. The learned trial judge would be correct after consideration of all aspect of relevancy and admissibility to admit or reject the same.

. Be as it may, the fact remains the learned judge has not taken this step, which has definitely caused prejudice to the cause of the plaintiff. In view of this aspect I am inclined to remand the matter for fresh trial according to law.

. Hence the appeal is allowed. The judgment and order passed by the lower court dated 23.9.2004 is hereby set aside. The matter is remanded. The learned trial judge is directed to take up the matter from the stage of recording of evidence after giving opportunity to both the sides to either admit or deny the documents. Thereafter he shall mark the admitted documents as proved and no further proof shall be required for the parties. So far as denied documents are concerned, the parties shall be given opportunities to present further proof in support of such documents and the matter shall be adjudicated accordingly on merits. The matter to be

heard and disposed of on merits within three months from the date of receipt of Writ of this Court. With these directions the appeal as well as civil application stands disposed of with no order as to costs. In the meantime ad-interim orders to continue.

. It is clarified that First Appeal No..1274 of 2004 shall also be remanded with the said directions given earlier in this judgment as the impugned order in First Appeal No.1274 of 2004 was passed on the basis of impugned order passed in First Appeal No.1268 of 2004.

. It is also clarified that the appellants in both the appeals was directed to deposit certain amounts by this court in the trial court and the respondent in both the appeals were allowed to withdraw the amount of Rs.10,000/= therefrom every month, that order shall stand continued,

. Certified copy expedited.